

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

MICHAEL L HEFNER
Claimant

MENARD INC
Employer

APPEAL 15A-UI-07714-JP-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 06/21/15
Claimant: Appellant (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from the July 2, 2015, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on August 3, 2015. Claimant participated and Scott Kolsrud participated on claimant's behalf. Employer participated through general manager, Gus Gerken. Harold Critchlow was present for the hearing on behalf of the employer, but did not testify. Employer Exhibits A and B were admitted into evidence with no objection.

ISSUE:

Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed part time as a cashier/carryout from February 28, 2014, and was separated from employment on June 19, 2015, when he was discharged.

The employer has a policy that prohibits gambling on company property, whether on or off the clock. Employer Exhibit A. The policy also provides that a violation of the policy may result in termination. Employer Exhibit A. When claimant was hired, he acknowledged that his HR Coordinator would explain the gambling policy to him. Employer Exhibit B. However, claimant testified that no one explained the policy to him. Claimant testified that there might be a policy about gambling, but he did not think it would apply if he was off the clock and outside the building.

Prior to June 19, 2015, claimant and another employee were leaving the employer's building when they began discussing which team would win an upcoming NBA basketball game. Claimant and the employee discussed the game in the employer's parking to the vehicle. Both the claimant and the employee then got into the vehicle and continued to discuss which team each of them thought was going to win. Prior to leaving the employer parking lot, the claimant and the employee agreed to bet each other on the game. Claimant testified that no monetary value was placed on the bet. Claimant subsequently lost the bet.

On June 19, 2015, claimant and the employee got into a physical altercation while at work. During the altercation, the employee put his hands on claimant and there was pushing and shoving. Claimant reported the altercation to his supervisor.

The employer conducted an investigation into the physical altercation. The employer determined the physical altercation was over the prior bet between the two. Mr. Gerken testified that claimant had been trash talking and bringing up the gambling debt with the other employee. Claimant testified that he did not feel he instigated the altercation with the other employee. Claimant testified that the other employee kept implying that claimant owed him money from the bet. Claimant testified there was never any dollar value on the bet. The other employee was terminated as a result of the incident. Mr. Gerken testified that claimant was terminated for gambling and the fact that a physical altercation occurred because of the gambling.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct. Benefits are denied.

Iowa Code § 96.5(2)a provides:

An individual shall be disqualified for benefits:

2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:

a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

Iowa Admin. Code r. 871-24.32(1)a provides:

Discharge for misconduct.

(1) Definition.

a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990). Misconduct must be “substantial” to warrant a denial of job insurance benefits. *Newman v. Iowa Dep’t of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984).

It is the duty of an administrative law judge and the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge, as the finder of fact, may believe all, part or none of any witness’s testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other evidence you believe; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996).

This administrative law judge assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and used my own common sense and experience. This administrative law judge reviewed the exhibits submitted. This administrative law judge finds the employer’s version of events to be more credible than claimant’s recollection of those events.

The employer has presented substantial and credible evidence that claimant gambled on company property in violation of known company policy prohibiting gambling. Employer Exhibits A and B. Claimant’s argument that there is no Human Resource Coordinator signature next to item #28 on Employer Exhibit B is not persuasive. Employer Exhibit B. Claimant’s signature indicates that he agreed to abide by all policies and also where to find the policies if he had questions. Employer Exhibit B. Claimant testified that he did not have the gambling policy explained to him; however, he did testify that he thought there would be a gambling policy in place, it just would not apply if he was off the clock and outside of the building. The employer’s policy on gambling prohibits any gambling on company property, regardless of whether the employee is on the clock. Employer Exhibit A.

Furthermore, the employer has presented substantial and credible evidence that claimant and another employee were involved in a physical altercation because of the bet. The employer has a duty to protect the safety of its employees. Even though the other employee may have made grabbed claimant first, claimant had made verbal contact with the other employee regarding the bet prior to the physical altercation. This, coupled with the gambling, is misconduct even without a prior written warning. Benefits are denied.

DECISION:

The July 2, 2015, (reference 01) unemployment insurance decision is affirmed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

Jeremy Peterson
Administrative Law Judge

Decision Dated and Mailed

jp/css